



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

May 5, 1999

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Councilman Juan Vargas
San Diego City Council District 8
3609 Fourth Avenue
San Diego, CA 92103

RE: MUR 4742

Dear Councilman Vargas:

On May 12, 1998, the Federal Election Commission notified you of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to you at that time.

Upon further review of the allegations contained in the complaint, and information supplied by you, the Commission, on April 27, 1999, found that there is reason to believe that you violated 2 U.S.C. §§ 441b(a), 441a(f) and 441a, provisions of the Act. The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office within 30 days of receipt of this letter. Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

If you intend to be represented by counsel, please advise the Commission by completing the enclosed form stating the name, address, and telephone number of such counsel, and authorizing such counsel to receive any notification or other communications from the Commission.

If you are interested in pursuing pre-probable cause conciliation, you should so request in writing. See 11 C.F.R. § 111.18(d). Upon receipt of the request, the Office of the General Counsel will make recommendations to the Commission either proposing an agreement in settlement of the matter or recommending declining that pre-probable cause conciliation be pursued. The Office of the General Counsel may recommend that pre-probable cause conciliation not be entered into at this time so that it may complete its investigation of the matter.

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Further, the Commission will not entertain requests for pre-probable cause conciliation after briefs on probable cause have been mailed to the respondent.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public.

If you have any questions, please contact Seth Row, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,



Scott E. Thomas
Chairman

Enclosures

Factual and Legal Analysis
Designation of Counsel Form

21-04-403-1581

FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Juan Vargas

MUR: 4742

This matter was generated based on a complaint filed with the Federal Election Commission ("The Commission") by Derrick Roach. See 2 U.S.C. § 437g(a)(2). This matter was also generated based on information ascertained by the Federal Election Commission in the normal course of carrying out its supervisory responsibilities. See 2 U.S.C. § 437g(a)(2).

I. Facts

A. Complaint

The complaint contains two theories of alleged illegal acts in connection with a debt owed by the Federal Committee to Primacy which has been outstanding since March, 1996. The Complaint alleges that the State Committee paid excessive amounts to Primacy as a means of paying off the debt owed to Primacy by the Federal Committee as a result of which the State Committee made a contribution to the Federal Committee. In the alternative the Complaint alleges that Primacy made an excessive contribution to the Federal Committee by forgiving the debt.

In its filings with the Federal Election Commission ("the Commission") since March, 1996, the Federal Committee has reported a debt to Primacy of \$24,506.07 from Mr. Vargas' unsuccessful 1996 campaign for the House. Complainant first alleges that Mr. Vargas' 1998 City Council campaign organization, the State Committee, paid down the Federal Committee's debt to Primacy by over-paying Primacy for services to the 1998 City Council campaign. To back up this assertion, the Complaint alleges that Primacy did "no visible campaigning or

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activity” for the State Committee to justify the fees paid to Primacy for the 1998 City Council race.

Complainant also argues, alternatively, that because no effort has been made to collect or pay the debt owed by the Federal Committee, Primacy has forgiven the debt and thus has made a corporate contribution to the Federal Committee.

B. Response

Respondents submitted a joint response signed by Deanna Liebergot, the treasurer for both the Federal and State Committees, Juan Vargas, and Larry Remer, Primacy’s owner.

Respondents admit that the Federal Committee owes Primacy \$24,506.07 for work performed as the Federal Committee’s primary vendor in the 1996 Congressional campaign. Respondents deny, however, that the State Committee paid down the Federal Committee’s debt. Specifically, Respondents deny Complainant’s assertion that Primacy did no work to justify the \$13,298.88 paid to Primacy by the State Committee in the first part of 1998, and the inference that the State Committee over-paid Primacy. Respondents assert that the State Committee engaged Primacy on retainer, and assert that Primacy performed substantial work for Mr. Vargas in connection with the City Council primary on June 2, 1998 and would have performed work for Mr. Vargas in connection with the general election on November 3, 1998, including fundraising, policy research and the like.¹

To back up their claim that Primacy indeed performed work for the State Committee during Mr. Vargas’ campaign for re-election to the City Council, Respondents provide Primacy

¹ The Commission notes that, after Respondents filed their response, Mr. Vargas won the June 2, 1998 City Council primary by over 50%, out-polling Mr. Gomez 3-to-1, according to news reports. Ray Huard, Incumbents In a Sweep, SAN DIEGO UNION-TRIBUNE, June 3, 1998, at B1. Mr. Vargas’ showing meant that there was no general election for this seat in November, 1998.

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invoices for December 1997 and the first three months of 1998; these invoices each list a \$3,000 charge attributed to "Consulting," and various charges attributed to copies, telephone charges, and reimbursement for lunches and meetings.² Along with payments for Primacy's consulting services, Respondents also state that the State Committee's treasurer, Deanna Liebergot, "is an employee of The Primacy Group, and monies paid include her fees; and the campaign fundraiser, Mr. James Taylor, is utilizing office space, phones, etc. at The Primacy Group and fees paid are also intended to pay those costs." Respondents' Letter at 1.

In response to the allegation that Primacy has forgiven the Federal Committee's debt, Respondents admit that no effort has been made to collect the \$24,506.07 debt, but insist that the debt will be paid in accordance with applicable laws. Respondents point out that the Federal Committee has not reported any reduction in the debt in filings with the Commission since March, 1996.

II. Analysis

A. The State Committee May Have Paid Down the Federal Committee's Debt Through Over-Payments to Primacy

The Federal Election Campaign Act of 1971, as amended ("the Act") states that no person shall make a contribution to a candidate and his authorized political committee with respect to any election for Federal office which, in the aggregate, exceeds \$1,000. 2 U.S.C.

§ 441a(a)(1)(A). A candidate, political committee or other person is prohibited from knowingly accepting or receiving any prohibited contribution made in violation of the Act or Commission

² Respondents also provide invoices from two other businesses -- a printer and a computer service -- which are apparently owned by Mr. Remer and housed at the same address as Primacy. Although the State Committee used these vendors during the 1998 City Council campaign, and the Federal Committee used these vendors during the 1996 campaign, these businesses are not named as Respondents in this matter.

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regulations. 2 U.S.C. § 441a(f). The term "contribution" includes any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office, as well as the payment by any person of compensation for personal services. 2 U.S.C. § 431(8)(A)(i),(ii). Also, under the Act contributions from corporations, labor organizations and national banks are prohibited and may not be accepted by candidates for Federal office.³ 2 U.S.C. § 441b(a).

The available information raises questions about whether the State Committee may have made excessive contributions to the Federal Committee by overpaying Primacy, in violation of 2 U.S.C. § 441a, and may have contributed money which contained funds contributed by prohibited sources, in violation of 2 U.S.C. § 441b(a). More information is required to determine whether these alleged improper contributions actually occurred.

The State Committee paid Primacy more than \$3,000 a month for consulting services in connection with the 1998 City Council campaign, and appears to have made one large payment at the end of the campaign.⁴ Primacy has submitted invoices for the City Council race for the first part of 1998, but these invoices do not provide details about what work was performed for the State Committee. The Commission notes that the State Committee paid Primacy over twice as much for the 1998 City Council re-election campaign as Mr. Vargas paid Primacy for Mr. Vargas' City Council re-election campaign in 1995. The Commission determined that in the 1995 campaign, which was uncontested, Mr. Vargas' state committee paid Primacy a total of

³ Also, under 11 C.F.R. § 110.3(d), it is illegal to transfer funds or assets from a candidate's campaign committee or account for a non-Federal election to his or her principal campaign committee or other authorized committee for a Federal election.

⁴ The State Committee paid Primacy, on average, \$3730.35 a month over the campaign period, January 1998 through June 1998, and made one \$15,000 payment at the close of the campaign; all of the payments were coded "P" for professional consulting services, according to the

\$15,309 for the nine-month campaign. See MUR 4311. By contrast, the State Committee paid Primacy \$40,582 for a six-month campaign, including a \$3,000 payment at the time the State Committee terminated in January, 1999, a full eight months after the election.⁵

The available facts raise questions about whether the substantial sum that the State Committee paid to Primacy for the 1998 race was commensurate with the competitiveness of the race. According to press reports, at all times during his 1998 re-election campaign Mr. Vargas held a considerable lead over his opponent, Mr. Gomez, in polling and in fundraising; toward the end of the race Mr. Vargas had raised about \$55,000, while Mr. Gomez had only raised about \$3,900. Anthony Millican, Challenger Gomez Battling Uphill Against Vargas, SAN DIEGO UNION-TRIBUNE, May 22, 1998, at B1. Because Mr. Vargas had some opposition, Mr. Vargas' 1998 City Council campaign might have needed to spend slightly more than Mr. Vargas' 1995 campaign. However, the fact that Mr. Vargas appears to have paid Primacy over twice as much in 1998 raises questions as to whether Primacy was over-paid for the 1998 campaign. This possibility, coupled with the fact that the debt owed by the Federal Committee has been outstanding since March, 1996 but that the Federal Committee by its own admission has not made any effort to pay off the debt, raises questions as to whether the State Committee paid down the Federal Committee's debt, constituting a contribution from the State Committee to the Federal Committee.⁶ See 11 C.F.R. § 100.7(a)(1)(iii)(A).⁷

California Fair Political Practices Commission coding system.

⁵ Interestingly, the State Committee made this final payment to Primacy in January, 1999 even though it had not paid Primacy for consulting work from July, 1998 -- one month after the election -- to the end of 1998. Because the State Committee did not report owing a debt to Primacy from July to December, 1998, it does not appear that the final \$3,000 payment in January, 1999 was repayment of a debt owed to Primacy. More information is required to determine why the State Committee made this final payment to Primacy.

⁶ Indeed, allegations from a previous complaint suggest that this pattern of activity may have

In addition, while Deanna Liebergot served as treasurer of both the Federal and State Committees during 1998, the State Committee was paying for her services and the Federal Committee was not. This fact raises questions as to whether the State Committee made an in-kind contribution to the Federal Committee by paying Primacy for Ms. Liebergot's services to both the Federal and State Committees. See 11 C.F.R. § 100.7(a)(1)(iii)(A). The invoices submitted by Primacy for work done by Primacy for the State Committee do not state how much money the State Committee paid for Ms. Liebergot's services.⁸

Although it is unclear how much money the State Committee may have contributed to the Federal Committee by paying down the Federal Committee's debt to Primacy or by paying for Ms. Liebergot's services to the Federal Committee, the State Committee will have made an excessive contribution if that amount is over \$1,000. See 2 U.S.C. § 441a. If the State Committee has contributed over \$1,000 to the Federal Committee, the State Committee may

commenced as early as 1995. In MUR 4311, Congressman Bob Filner, Mr. Vargas' opponent in the 1996 Democratic primary, alleged that Mr. Vargas used money from his 1995 City Council campaign to start his Congressional campaign in late 1995, and that Primacy was over-paid by the City Council campaign committee, and underpaid by the Federal Committee, to effect a transfer of money from the City Council campaign committee to the Federal Committee. The Commission concluded, however, that the information presented in that complaint was insufficient to warrant a recommendation of reason to believe. In that same MUR, the Federal Committee was admonished about adhering to the Act's limits on accepting contributions, see 2 U.S.C. § 441a(f), in connection with the Commission's finding of reason to believe that the Federal Committee had violated the Act when the candidate took out a large unsecured loan, co-signed by his wife, which he spent on the campaign.

⁷ See also 11 C.F.R. § 110.3(d); AO 1996-33.

⁸ The State Committee, in filings with the State of California, did not indicate how much of the money it paid to Primacy went to pay Ms. Liebergot's fees, instead reporting only the lump payment to Primacy. The Federal Committee listed a \$3,000 debt to Ms. Liebergot in its filings with the Commission for the first part of 1998, but did not denominate this as "salary," as it did for some other debts owed to employees. Interestingly, however, the debt which the Federal Committee owes to Primacy has not increased since March 1996, even though Ms. Liebergot has been serving as its treasurer since the Committee began filing with the Commission in October, 1995.

have become a political committee under the Act, see 2 U.S.C. § 431(4)(A), and may have violated the Act by failing to register as such and report its disbursements to the Federal Committee. See 2 U.S.C. §§ 433 and 434. In addition, because California imposes fewer restrictions on contributions to campaigns for state elective offices than the Act, see CAL. GOVT. CODE § 85305(c)(1) (West 1998), some of the funds which the State Committee may have contributed to the Federal Committee may have come from sources prohibited under the Act, in violation of 2 U.S.C. § 441b(a).

More information is required about what work Primacy performed for the State Committee, the basis for the amount of the fees paid by the State Committee, and what services rendered by Ms. Liebergot the State Committee was paying for.

Because the available facts raise questions as to whether the State Committee may have made illegal contributions to the Federal Committee, there is reason to believe that Juan Vargas violated 2 U.S.C. §§ 441a and 441b(a) by making excessive contributions to the Federal Committee which also may have contained funds from sources prohibited under the Act. There is also reason to believe that Juan Vargas may have violated 2 U.S.C. §§ 441a(f) and 441b(a) by knowingly accepting excessive contributions from the State Committee which also may have included funds from sources prohibited under the Act.

B. Primacy and Larry Remer May Have Made a Contribution to the Federal Committee by Forgiving the Federal Committee's Debt

1. Law

The Act states that no person shall make a contribution to a candidate and his authorized political committee with respect to any election for Federal office which, in the aggregate, exceeds \$1,000. 2 U.S.C. § 441a(a)(1)(A).

Under the Act, an employer makes a contribution to a candidate when it compensates an employee who provides "volunteer" services to the candidate. See 11 C.F.R. § 100.7(a)(3).

However, if the employee works as a "volunteer" during regular working hours, but makes up the time spent not working for the employer, no contribution has taken place. 11 C.F.R.

§ 100.7(a)(3)(i). Similarly, if the employee volunteers services for the candidate during time for which they are not paid by the employer, then no contribution by the employer has resulted. See 11 C.F.R. §§ 100.7(a)(3)(iii) and 100.7(a)(3)(ii). In addition, legal and accounting services are not considered "contributions" to an authorized committee if the person paying for the services is the regular employer of the person performing the services and the services are solely to ensure compliance with the Act. 2 U.S.C. § 431(8)(B)(ix)(II).

The extension of credit by any person to a candidate's authorized political committee is also a contribution, unless the credit is extended in the ordinary course of business.

11 C.F.R. § 100.7(a)(4). The terms of any credit extended must be substantially similar to extensions of credit to nonpolitical debtors that are of similar risk and size of obligation.

11 C.F.R. § 116.3(a). In determining whether credit was extended by an unincorporated vendor⁹ in the ordinary course of business, the Commission will examine the vendor's established procedures and past practice in approving credit, the usual and normal practice in the vendor's industry, and whether the vendor received prompt payments in the past from the candidate or the candidate's authorized committee. See 11 C.F.R. § 116.3(c).

In addition, a commercial vendor must pursue collection of a debt in a commercially reasonable manner; otherwise, a contribution will result. 11 C.F.R. § 100.7(a)(4). To settle or

⁹ As noted below, although Complainant implies that Primacy is a corporation, a check of public records by the Commission revealed that Primacy is not incorporated.

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forgive a debt owed by an ongoing committee without making a contribution, the vendor must file with the Commission its intention to settle or forgive the debt. 11 C.F.R. § 116.8. The Commission will determine if forgiveness or settlement of a debt owed to an unincorporated vendor is "commercially reasonable" based on factors such as whether the debtor committee has made reasonable efforts to raise the funds to pay back the debt, 11 C.F.R. § 116.4(d)(2), and whether the vendor has made similar efforts to collect the debt as it would a nonpolitical debt, such as by withholding additional goods or services until payment on the debt is made, referring the debt to a debt collection agency, or commencing litigation. See 11 C.F.R. § 116.4(d)(3).

b. Analysis

The available evidence raises questions as to whether, under an alternative theory, Larry Remer, the owner of Primacy, may have made an excessive contribution to the Federal Committee by failing to make a commercially reasonable attempt to collect the debt.¹⁰ See 11 C.F.R. § 100.7(a)(4). However, there are significant questions which need to be answered before the Commission can determine whether the violations described by this alternative scenario in fact occurred.¹¹

Although Respondents claim that the Federal Committee intends to pay the debt, the Commission does not have any information to indicate that Primacy has made any attempt to collect the debt. As noted above, the debt of \$24,506.07 has been outstanding since March,

¹⁰ Although Complainant alleges that forgiveness of the debt owed to Primacy by the Federal Committee would constitute a corporate contribution to the Federal Committee, the Primacy Group is not incorporated in California. Nevertheless, the complaint does raise a valid allegation of an excessive personal contribution by Larry Remer, the owner and apparent sole proprietor of Primacy, in violation of 2 U.S.C. § 441a(a)(1)(A).

¹¹ There is also a possibility that Primacy may have extended credit to the Federal Committee in March 1996, the month that the debt was incurred, outside of the ordinary course of business. See 11 C.F.R. § 116.3(c). The Commission will examine this potential violation if further

1996.¹²

Furthermore, the available information raises questions as to whether the Federal Committee is making reasonable efforts toward raising the money to pay off the debt to Primacy. The Federal Committee reported \$88.53 cash on hand as of December 31, 1998, and debts outstanding on that date of \$67,017.39. The Federal Committee raised \$500.00 in the last half of 1997 which all went to pay down a debt from the '96 campaign to Mr. Remer's printing business, raised \$2000.00 in the first half of 1998 from a PAC, which was disbursed immediately to pay off a debt to a campaign worker, and received a \$2,000 contribution in the last half of 1998 from Larry Remer, himself, and his wife, which went to pay down a loan from Mr. Vargas to the Federal Committee, and not the debt to Mr. Remer's company. In addition, the Federal Committee has paid down several debts outstanding to other vendors, without paying down the Primacy debt at all.¹³ The fact that the Federal Committee has paid down debts to other creditors since the election, including the candidate, but not Primacy, raises questions about whether the Federal Committee is making reasonable efforts to repay the debt.

The Commission also notes that, despite the debt owed to Primacy, Mr. Vargas and Mr. Remer apparently continue to enjoy a close relationship. Both the Federal Committee and the State Committee are housed at Primacy's address and, as noted above, a Primacy employee is treasurer to both committees. As noted above, Mr. Remer and his wife also contributed \$2,000

information indicates that such an illegal extension of credit may have occurred.

¹² In January and February, 1996, the Federal Committee paid Primacy a \$1,000 monthly retainer. In March, 1996, the month the debt to Primacy was incurred, the Federal Committee paid Primacy a total of \$112,650.00 for advertising leading up to the primary election. The debt may be the cost of advertising for which Primacy was not reimbursed in the last month of the campaign.

¹³ The Federal Committee owes \$22,500 to its former employees, nearly \$3,000 to outside vendors, and \$2,990.13 to PG Printing and Graphics, a company owned by Mr. Remer and

to the Federal Committee in November, 1998, which was disbursed immediately to pay down a loan from Mr. Vargas to the Federal Committee.¹⁴ Further, Mr. Remer's daughter, a high school student, was recently an intern in Mr. Vargas' city council office. Diane Bell, SAN DIEGO UNION-TRIBUNE, Aug. 12, 1997, at B1.

Because the available evidence raises questions as to whether, under an alternative theory, Mr. Remer made an excessive contribution to the Federal Committee by failing to make a commercially reasonable effort to collect the debt, there is reason to believe that Juan Vargas violated 2 U.S.C. § 441a(f) by accepting contributions in excess of statutory limits.

located within the Primacy building.

¹⁴ The Federal Committee owes Mr. Vargas \$12,225.00 as of December 31, 1998.

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